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# In the Supreme Court of the United States

OCTOBER TERM, 1964

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No. 1004

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AIR DISPATCH, INC., ET AL., APPELLANTS

*v.*

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

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On Appeal from the United States District Court for the Eastern District of Pennsylvania

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## MOTION TO AFFIRM

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Pursuant to Rule 16, paragraph 1(e), of the Rules of this Court, the United States and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

### STATEMENT

This is a direct appeal from a final judgment of a three-judge district court entered January 18, 1965,

dismissing an action to set aside an order of the Interstate Commerce Commission adopting rules interpreting Section 203(b)(7a) of the Interstate Commerce Act, which exempts from economic regulation by the ICC motor transportation of persons or property that is "incidental to transportation by aircraft". The rules provide that motor transportation of property will be considered "incidental to transportation by aircraft"—and hence not subject to ICC regulation—when the motor transportation is confined to "collection, delivery, or transfer service performed within the terminal area" described in a valid tariff filed with the CAB by "the direct air carrier or air freight forwarder (indirect air carrier) providing the line-haul transportation", and is confined to shipments which "have been received from or will be delivered to a direct air carrier or air freight forwarder as part of a continuous movement . . . performed on a through bill of lading" covering both the air and motor transportation. The Commission reserved the right to determine "whether the area within which the transportation of property by motor vehicle, in bona fide collection, delivery, or transfer service, must be performed, in order to come within * * * [the rule above described] should be individually determined with respect to any particular airport or city authorized to be served by a direct air carrier or air freight forwarder holding authority from the Civil Aeronautics Board, and whether there should be established therefor appropriate boundaries, differing in extent from the terminal areas of such direct air carriers

or freight forwarders as defined in tariffs filed with and accepted by the Civil Aeronautics Board."[1]

These rules were promulgated after consultation between the ICC and the CAB and were published in the Federal Register the same day that CAB rules regulating motor pickup and delivery of freight incidental to air transportation were published. The CAB rules require carriers to file tariffs with the CAB for pickup and delivery service in connection with air transportation, which "will be accepted for filing" if the service is performed within a radius of 25 miles "of the airport or the city limits of the certificated point," or if the CAB grants special permission for services to be performed beyond that limit, or if the service is performed to "places or areas included in other currently effective pickup and delivery tariffs on file with the Board" (J.S. 37a-39a).

The ICC regulations were challenged in the court below on the ground that a combination of ground and

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[1] The rules also exempted motor transportation that is substituted for air transportation in emergency situations arising from the direct air carrier's inability to perform the air transportation due to causes beyond its control and is performed on a through bill of lading and at the expense of the direct air carrier or the air freight forwarder. They further provide that an air freight forwarder subject to economic regulation under the Federal Aviation Act may receive freight from or deliver it to motor common carriers subject to regulation under Part II of the Interstate Commerce Act and not within the exemption of Section 203(b)(7a) without being considered subject to ICC regulation under Part IV of the Interstate Commerce Act if it does not assume responsibility for or receive compensation for the carriage performed by the motor carrier. See J.S. 40a-42a.

air transportation provided under a single through bill of lading (*e.g.*, by air freight forwarders) is subject to the exclusive jurisdiction of the CAB, which alone may regulate the scope of such operations. The district court dismissed the complaint, holding that "the I.C.C. has the jurisdiction to define the scope of the exemption in Section 203(b)(7a)" (J.S. 6a). In the proceeding below, the CAB filed an *amicus curiae* statement that the Commission has authority "to initially determine" the scope of exemptions from its authority, and pointed out that "[t]here is no conflict between the Board and the Commission, and the regulations of the two agencies were adopted in an effort to reach a practical accommodation with respect to the problems involved."

## ARGUMENT

The issue raised on this appeal is in many respects premature and there is no substantial question now warranting plenary consideration by this Court. The Interstate Commerce Commission's rules defining the scope of the exemption from Commission authority of motor carriage incidental to transportation by aircraft were formulated in cooperation with the Civil Aeronautics Board. Without binding itself for the future, the Commission promulgated rules defining the scope of the motor carrier exemption largely by reference to standards adopted by the CAB for air carriers providing motor carrier pickup and delivery service in connection with air transportation. The Commission's rules establish no new policy, but are generally a

codification of principles established in prior adjudicatory proceedings. The asserted potential conflict or overlap between the ICC and CAB regulatory jurisdictions has not occurred and may never occur.

In any event, we submit that the court below properly held that the rules were lawfully promulgated pursuant to statutory authority vested in the Commission by the Motor Carrier Act.[2] That Act places primary responsibility upon the Commission for the regulation of interstate motor carriage. All common and contract carriers by motor vehicle subject to Part II of the Interstate Commerce Act are required by Sections 206(a) and 209(a) of that Act to obtain a certificate of public convenience and necessity or a permit from the Commission. Within a limited sphere the CAB also has jurisdiction over surface transportation that is performed in connection with air transportation. It is pursuant to Section 403(a) of the Federal Aviation Act that the CAB is concerned with motor pickup and delivery service that is performed in connection with air transportation.[3]

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[2] A recent three-judge court decision, *Wycoff Co.* v. *United States*, (No. C 108-62, D. Utah, decided March 31, 1965) sustained the order of the Commission denying exempt status to a motor carrier for operations extending up to several hundred miles from an airport. The Commission relied in part upon the rule here challenged. Relying upon the instant case, the court held that the Commission had authority to issue the rules under § 203(b)(7a).

[3] Section 401(a), 49 U.S.C. 1371(a) provides:

"No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board

The Federal Aviation Act, however, establishes no criteria for determining when ground transportation services that have some connection to air transportation are subject to CAB authority and when they are subject to ICC authority. To determine the respective jurisdictions, Congress, in the Civil Aeronautics Act of 1938, amended the Interstate Commerce Act, by exempting from Commission economic regulation motor transportation that is "incidental to transportation by aircraft." As so amended, Section 203(b) of the Interstate Commerce Act provides:

> Nothing in this part, except the provisions of Section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include * * * (7a) the transportation of persons or property by motor vehicle when incidental to transportation by aircraft * * *.

The Commission has no authority to impose economic regulations on exempted carriage. But the scope of the exemption must, of course, be defined, and power to make the necessary determinations must be lodged somewhere. Because the exemption is a part of the Act administered by the Interstate Commerce Commission, and the subject

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authorizing such air carrier to engage in such transportation."

Section 101(3), 49 U.S.C. 1301(3), definies "air carrier" as a "citizen of the United States who undertakes, whether directly or indirectly * * * to engage in air transportation."

matter is motor transportation, it was natural to place initial authority to define the excepted area in the Commission. The Commission has in fact done so on many occasions. See, *e.g.*, *Sky Freight Delivery Service, Inc., Com. Car. Application*, 47 M.C.C. 229; *Teterboro Motor Transp., Inc., Com. Car. Application*, 47 M.C.C. 247; *Kenny Extension—Air Freight*, 49 M.C.C. 182; 61 M.C.C. 587. The CAB agrees that the Commission has primary responsibility for defining the scope of the exemption. And the Court of Appeals for the District of Columbia Circuit, in *City of Philadelphia* v. *C.A.B.*, 289 F. 2d 770, has expressly so recognized. In sustaining the Board's finding that a motor pickup and delivery service to and from Philadelphia, Pennsylvania in conjunction with air freight service to Newark, New Jersey constituted "air transportation" to Philadelphia within the meaning of the Federal Aviation Act and was in accord with the terms of a certificate requiring air service to Philadelphia, the court quoted approvingly from the Board's decision:

> Whether the * * * truck haul should be considered as incidental to air transportation within the meaning of the Interstate Commerce Act, and thereby exempt from economic regulation under that statute, is a matter for the Interstate Commerce Commission. We do not intend that our action here should influence what that decision should be. (289 F. 2d at 774-775).

Appellant relies upon Section 203(a)(10) of the Interstate Commerce Act, which defines interstate commerce to include commerce partly by motor ve-

hicle and partly by rail, express, or water—but does not mention commerce moving partly by air—and upon Section 101(21) of the Federal Aviation Act, *supra*, defining "interstate air transportation," to include commerce moving partly by air and partly by "other forms of transportation", to sustain the contention that Congress intended to "place all through-bill joint air-motor transportation exclusively under the economic control of the Civil Aeronautics Board" (J.S. 9). But these statutory definitions cannot be so read.[4] If appellants were correct, it would be difficult to understand why Section 203(b) of the Interstate Commerce Act expressly reserves to the Commission authority over "qualifications and maximum hours of service of employees and safety of operation or standards of equipment" of motor carriers providing service incidental to transportation by aircraft. Appellants' argument that through air-motor transportation is under exclusive CAB control is, moreover, inconsistent with

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[4] The legislative histories of both the Motor Carrier Act of 1935, 49 Stat. 543 and the Civil Aeronautics Act of 1938, 52 Stat. 973, show that the clauses in the two definitions referring to transportation in part by air or motor and in part by another mode of transportation were added to prescribe the scope of Federal regulation of intrastate movements, and had nothing to do with reducing ICC jurisdiction over motor transportation. See Second Report of the Federal Coordinator of Transportation, S. Doc. 152, 73d Cong., 2d Sess., pp. 44-45; Conference Report on Air Commerce Act of 1926, 44 Stat. 568, 67 Cong. Rec. 9389; and *Flying Tiger Line, Air-Truck Service*, 30 C.A.B. 242, 255, affirmed on other grounds *sub nom. City of Philadelphia* v. *C.A.B.*, 289 F. 2d 770 (C.A.D.C.).

Section 402(a)(7) of the Interstate Commerce Act, 49 U.S.C. 1002,[5] which, in effect, provides for separate regulation, by the CAB and the ICC, of the respective air and land portions of freight forwarder service. And the argument makes nonsense of Section 1003 of the Federal Aviation Act, 49 U.S.C. 1483,[6] which provides for a joint CAB-ICC board to regulate through air-land transportation services when performed under joint rates, obviously assuming that each agency will regulate the appropriate phase of the service when separate rates are stated.[7]

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[5] This section brings all surface forwarder service within the jurisdiction of the Commission, except "that part" of the forwarder's service for which he uses an air carrier or an incidental motor carrier. The House report cited by appellants states in the sentence following the one quoted by appellants (J.S. 10): "To the extent that a particular company is engaged in both surface and air forwarding operations, such company will, as to its surface forwarding operations, be subject to regulation under Part IV [of the Interstate Commerce Act], and, as to air forwarding operations, subject to the Civil Aeronautics Act." H. Rep. 1172, 77th Cong., 1st Sess., p. 7.

[6] Section 1003 provides in part:

"Air carriers may establish reasonable through service and joint rates, fares, and charges with other common carriers; except that with respect to transportation of property, air carriers not directly engaged in the operation of aircraft in air transportation (other than companies engaged in the air express business) may not establish joint rates or charges, under the provisions of this subsection, with common carriers subject to the Interstate Commerce Act."

[7] *Railway Express Agency, Inc.* v. *C.A.B.* (No. 18,868, C.A.D.C., decided March 18, 1965), which is cited in appellant's "Supplement to Jurisdictional Statement", merely

## CONCLUSION

For the foregoing reasons, we submit that this case presents no substantial question warranting review by this Court and that the judgment below should be affirmed.

Respectfully submitted.

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APRIL 1965.

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held that Section 1003 does not permit a surface carrier to engage in indirect air carriage without proper certification from the CAB. The court noted that the section "provides a procedure for regulation of rates and practices in cases where an air carrier arranges with a surface carrier for through transportation services" when each carrier is operating within the proper scope of its authority.

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